IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-482
Lower Tribunal No.: 0f-1378

TROY VICTORINO

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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Introductory Statement: the Limited Purposes of a Reply Brief

Under Rule 9.210(d), Fla. R. App. P., reply briefs are limited to presenting ". . .argument in response and rebuttal to argument presented in the answer brief." Put differently, the reviewing courts do not consider issues raised for the first time in an appellant's reply brief. Williams v. State, 845 So.2d 987, 989 (Fla. 1st DCA 2003). Accordingly, no "new" issues are raised in this reply brief.

Issue 1: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Not Objecting to the Emotional and Inflammatory 911 Emergency Phone-Call Recording

At page 25 of its Answer Brief, Appellee states, "The facts of this case are horrendous at best, and no part of the 911 call put anything before the jury that they did not also hear from other sources, in far greater (and more graphic) detail." Appellee seems to argue that, because Appellant's jurors learned the same gory facts from other witnesses and evidence, it had *carte blanche* to continue presenting the same shocking facts over and over again, as frequently and as offensively as possible. Appellee disagrees.

Although the testimony of murder-scene-discoverer Christopher Carroll was *relevant*, it also charged with emotion. Christopher Carroll's extreme shock was

apparent in the words he used and in the manner in which he said them. As Appellant explained in his Appellant's Initial Brief, when crime-scene-discoverer Christopher Carroll dialed 911 and spoke to the police, he said " . . I come in and the door's kicked in and I see blood. That's all I see . . . There's four or five people in there and they're just all laying on the floor and I yelled and yelled and yelled and no one answered . . . and I walked in and just looked in the bedroom and I see blood on the bed and I stopped and backed up." R29, p. 1800-1802, referenced at PCR5, p. 572-573 of subject motion.

Objecting to emotional and inflammatory trial statements is the responsibility of defense counsel, regardless of the relevance or cumulativeness of the evidence. *See, e.g.* McDonald v. State, 743 So.2d 501, 505 (Fla. 1999); Urbin v. State, 714 So.2d 411, 418 n. 8 (Fla. 1998); Chandler v. State, 702 So.2d 186, 191 (Fla. 1997); Kilgore v. State, 688 So.2d 895, 989 (Fla. 1996). Failing to contemporaneously object to inflammatory statements, bars the issue from appellate review. Brooks v. State, 762 So.2d 879, 898 (Fla. 2000). Claims of trial counsel ineffectiveness for failing to resist improper statements are properly raised in these types of "ineffective assistance of counsel" post-conviction proceedings. Franqui v. State, SC05-830 (Fla. 1-6-2011)

More importantly, this reviewing Florida Supreme Court does not look at

each individual piece of inflammatory evidence or testimony in isolation. Rather, this Florida Supreme Court evaluates the cumulative effect of *all* improper statements made during trial. Brooks v. State, 762 So.2d 879, 899 (Fla. 2000). In the present Appellant's Initial Brief, Appellant complained of improper witness statements and improper, gruesome, photographic evidence (Initial Brief Issues 1, 3, 10, 12). Appellant also complained of improper prosecutor statements (Initial Brief Issues 6, 7, 16.

As Appellee points out, Defendant's jurors eventually learned the shocking facts of the subject murders from the various other witnesses and evidence. However, this does not excuse the unnecessarily inflammatory conveyance of the emotion-evoking testimony and evidence in other parts of the trial.

Issue 2: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Failing to Timely and Correctly Object and Move for Mistrial When Cannon Testified Against this Defendant and Then Refused to Answer Cross-Examination Questions

At page 29 of its Answer Brief, Appellee states, "The Defendant has not alleged or proven deficient performance and he has not alleged adequate grounds fo the court to conclude that, had an objection been made, a mistrial would be granted."

Appellee shall first address the first part of Appellee's above-quoted

statement. Appellee states that the Appellant has not *alleged* deficient performance (of defense counsel.) Actually, Appellant *did* allege deficient attorney performance. At page 32 of Appellant's Initial Brief, Appellant alleged that ". . . trial counsel's failure to timely object and move for mistrial when Cannon refused to answer cross-examination questions was both 'presumptive' ineffective assistance of counsel under United States v. Chronic, 466 U.S. 648 (1984) and 'proven' ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984)." Appellant also alleged that the shut-down by State witness Cannon (and defense counsel's subsequent lack of a motion for curative instruction or mistrial motion) violated Appellant's " . . . right to confront and cross-examine adverse witnesses (as) guaranteed by the 6th Amendment to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution." (Appellant's Initial Brief, p. 26).

The second incorrect part of Appellee's above-quoted statement is Appellee's statement that Appellant has not *proven* deficient performance (of defense counsel). Actually, at pages 22-26 of Appellant's Initial Brief, Appellant quoted and gave references to trial transcripts showing that (A) State witness Cannon took the stand and gave testimony implicating Appellant, and (B) Cannon thereafter "shut down," refusing to allow himself to be cross-examined by

Cannon's trial counsel, and (C) there was no timely mistrial or request for a curative instruction by Appellant's trial counsel.

Although Appellant included argument and authority on this "Cannon shut-down" issue in his Initial Brief, Appellee's statement that "The Defendant has not alleged or proven deficient performance and he has not alleged adequate grounds for the court to conclude that, had an objection been made, a mistrial would be granted" indicates that clarification is in order.

First, as Appellant stated at page 23 of his initial brief, Cannon testified that he drove Appellant to the murder victims' house (the "Telford house") and that the intention was to kill everyone in the house. R30, p. 1951-1952. Cannon gave further testimony characterizing himself and Co-Defendant Salas as unwilling subjects who Appellant Victorino coerced into participating in the murders. R30, p. 1952. In other words, Cannon was an *adverse* witness to Appellant Victorino. Cannon gave testimony indicating Appellant Victorino was the ringleader and a major participant in the subject murders.

Cannon's shut-down created the very problem that the hearsay rule is intended to prevent: adverse witness testimony that Defendant cannot confront (cross-examine).

According to Ehrhardt, " . . . the lack of an opportunity to cross-

examine the person who made the out-of-court statement to test the person's perception, memory, sincerity, and accuracy of the description of the event raises serious questions concerning the reliability of the statement (and) . . . is probably the most persuasive current reason for the (hearsay) rule." Ehrhardt's Florida Evidence, 2009 Ed. §801.1, p. 766.

Appellee argues that Appellant failed to allege or prove deficient performance of counsel on this point. However, passively allowing the continuation of a trial in which Defendant's right to confront adverse witness testimony has been violated –as it was in this case– is *per se* ineffective assistance of counsel. In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that allowing the State to present the recorded statement of an adverse witness whom the Defendant has no opportunity to cross-examine is such a grave violation of Defendant's 6th Amendment right to confront adverse witnesses that it vitiates the entire trial.

In Crawford, the adverse witness was the Defendant's wife, Sylvia. The Defendant was charged with attempting to murder someone that the Defendant claimed was attempting to rape Sylvia. The United States Supreme Court explained that the allowing Defendant's wife's recorded statement to be played to Defendant's jurors without an opportunity for Defendant to cross-examine her was

was in itself a violation a Sixth Amendment requiring no harmless error analysis:

> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered.
>
> (Crawford v. Washington, 541 U.S. 36 (2004) at pp.68-69)

The following are two oft-quoted statements of the Crawford court:

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes
>
> (Crawford, supra, p. 62)

> The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.
>
> (Crawford, supra, p. 67)

This Florida Supreme Court has made it clear that limitations on an accused's questioning (cross-examination) of adverse witnesses will likely lead to reversal of the conviction. In McDuffie v. State, 970 So.2d 312 (Fla. 2007), this Florida Supreme Court, citing Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978) explained:

> The scope of cross-examination is not without bounds, but "where a criminal defendant in a capital case, while exercising his Sixth Amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness's testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error." Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978).

The State has a co-equal right to wide-ranging cross-examination of the Defendant when a Defendant takes the stand and testifies in his own behalf. Boyd v. State, 910 So.2d 167 (Fla. 2005). Protection of the right to challenge adverse witness with cross-examination is the reason why, with limited exceptions, hearsay evidence is not allowed in most U.S. trials.

Another reason the courts do not engage in a harmless-error analysis in violation-of-confrontation clause cases is that effective cross-examination involves asking wide-ranging and somewhat unpredictable questions. As this

Florida Supreme Court explained at page 185 of Boyd, supra,

> [W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. . . . Coco v. State, 62 So.2d 892, 895 (Fla. 1953)

In other words, it is futile for this Florida Supreme Court to now speculate about what cross-examination of Cannon *might* have yielded. The only way to know for certain what will be revealed by cross-examination is to cross-examine.

Issue 3: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel For Not Raising " Calls for Speculation" and "Calls for Opinion of a Lay Witness" Objections to Questions Eliciting Testimony About What Codefendants Were Thinking

Appellee states at pages 34-35 of its Answer Brief, "Moreover, as the collateral proceeding trial court expressly found, the evidence at issue here is so inconsequential that there is no reasonable probability of a different result."

This Florida Supreme Court does not rate the prejudicial impact of each piece of improper evidence or each improper courtroom statement in isolation. This Florida Supreme Court evaluates the cumulative effect of *all* improper

statements made during trial. Brooks v. State, 762 So.2d 879, 899 (Fla. 2000). In the present Appellant's Initial Brief, Appellant complained of improper witness statements and photographic evidence (Initial Brief Issues 1, 3, 10, 12) as well as improper prosecutor statements (Initial Brief Issues 6, 7, 16). Appellant now respectfully asks this reviewing court to adhere to its practice of considering the prejudicial effect of *all* improper statements and evidence *cumulatively*.

Issue 4: Withdrawn

Issue 5: Withdrawn

Issue 6: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Not Objecting to Prosecutor Statements Which Effectively Asked the Jurors to Imagine What the Victims Felt

Appellant stands on the argument he made in his Initial Brief on this issue, and again urges this Florida Supreme Court to consider the cumulative effect of *all* improper statements and evidence, as Appellant requested in his argument for Issue 3 above.

Issue 7: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in Not Objecting to Prosecutorial Remarks That Aroused Fear in the Jurors

At page 37 of its Answer Brief, Appellee states, ". . . there has been no showing of prejudice (especially in light of the uncontested facts of these

murders)."

This Florida Supreme Court does not rate the prejudicial impact of each piece of improper evidence and each improper courtroom statement in isolation. Rather, this Florida Supreme Court evaluates the cumulative effect of *all* improprieties that occur during trial. Brooks v. State, 762 So.2d 879, 899 (Fla. 2000). In Appellant's Initial Brief, Appellant complained of improper witness statements and photographic evidence (Initial Brief Issues 1, 3, 10, 12) as well as improper prosecutor statements (Initial Brief Issues 6, 7, 16). Appellant now respectfully asks this reviewing court to adhere to its practice of considering the prejudicial effect of *all* improper statements and evidence *cumulatively*.

Issue 8: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in Failing to Rebut the State's Argument That the Defendants Entered the Telford Lane House to Commit the Crime of Armed Burglary

Appellant stands on the argument he made in his Initial Brief on this issue.

Issue 9: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Admitting During Closing Argument That The "Prosecution Has Done a Wonderful Job Here"

At page 40 of its Answer Brief, Appellee states, "Victorino failed to carry his burden of proving any deficiency on the part of counsel, and has not shown prejudice as *Strickland* requires." Appellant stands on the argument he made in

his Initial Brief on this issue, and urges this Florida Supreme Court to consider the cumulative effect of *all* improper statements and evidence, as Appellant requested in his argument for Issue 3 above.

Issue 10: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in Connection With Improper "Victim-Impact" Testimony

This is yet another case revealing how out-of-control victim-impact evidence has become in Florida. Appellant urges this Florida Supreme Court to revisit its prior rulings on this subject and make a new ruling that, although a wide range of victim-impact evidence *is* admissible, "grief" and "mourning" evidence are not. Beyond this, Appellant stands on the argument he made in his Initial Brief on this issue.

Issue 11: Ineffective Assistance of Counsel in Failing to Evaluate Alibi Witnesses and in Presenting an Unbelievable and Damaging Alibi Defense

Appellant stands on the argument he made in his Initial Brief on this issue.

Issue 12: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Not Objecting to Gruesome Photographs

Appellant stands on the argument he made in his Initial Brief on this issue, and again urges this Florida Supreme Court to consider the cumulative effect of *all* improper statements and evidence, as Appellant requested in his argument for Issue 3 above.

Issue 13: Withdrawn

Issue 14: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel in the Failure to Present the Mitigation Testimony of Ms. Dorona Edwards

Ms. Dorona Edwards revealed in her evidentiary-hearing testimony that Appellant has some positive attributes that his jurors did not hear about. Should this Florida Supreme Court hold that Appellant is entitled to a new sentencing proceeding, it is difficult to imagine his trial counsel not calling Ms. Edwards as a defense mitigation witness. Pursuant to Strickland v. Washington, 466 U.S. 668 (1984), Appellant respectfully asks this Florida Supreme Court to consider the cumulative effect of this omission along with all of the other errors identified in Appellant's Initial Brief when deciding whether Defendant was prejudiced as a result of errors of counsel.

Issue 15: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel Due to the Cumulative Effect of All of the Combined Errors of Counsel

Appellant stands on the argument he made in his Initial Brief on this issue.

Issue 16: The Trial Court Erred in Not Finding Ineffective Assistance of Counsel for Failing to Object to State Argument Indicating That the State Pre-Screens Cases and Only Prosecutes People Who Are Truly Guilty

At page 48 of its Answer Brief, Appellee states, "There was nothing

improper about the complained-of statement, and, even if there were, there is no reasonable probability of a different result had the jury been instructed to disregard that statement. There was no deficiency, nor was there prejudice. Strickland requires both, and Victorino has established neither one."

In reply, Appellant stands on the argument he made in his Initial Brief on this issue, and again urges this Florida Supreme Court to consider the cumulative effect of *all* improper statements and evidence, as Appellant requested in his argument for Issue 3 above.

Issue 17: The Trial Court Erred in Failing to Find That Defendant's Death Sentences are Illegal Under *Ring v. Arizona*

Appellant stands on the argument he made in his Initial Brief on this issue.

Issues Not Specifically Responded to in This Reply Brief

With regard to any issues not specifically responded to in this Reply Brief, the Appellant stands on the Argument he submitted in his Initial brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been served to the Attorney General's Office to AAG Kenneth Nunnelley, Esquire, by email at

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and a copy of this brief has been served by U.S. Mail addressed to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in Times New Roman 14-point font and thus complies with the font requirement of Rule 9.210, Fla. R. App. P.

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